

SUPREME COURT OF NIGERIA
16TH DECEMBER, 2005. SC. 139/2001
CORAM:- S. U. ONU, N. TOBI, G. A. OGUNTADE, M.
MOHAMMED, W.S.N. ONNOGHEN, JJSC

PETER OJOH APPELLANT
AND
1. OWUALAKAMALU
2. AMANZEANYAMELE
3. GODWIN ANYANTONWU RESPONDENTS
4. IHEJIRIKA AHUCHOGU

LAND LAW - Pleadings - Family land - Facts elicited in cross examination - Go to no issue - Where they are not pleaded (H1)

LAND LAW - Res judicata - Pleadings - Consistency - Confused evidence of an aged witness - Should not be the reason - For defendant to go contrary to his pleadings (H2)

APPEALS - Reversal - Admission of inadmissible evidence - Can only ground a reversal - If the exclusion of that evidence - Makes it impossible for the judgment to stand (H3)

LAND LAW - Title - Pleadings - Fact is to be pleaded not document - Where defendant failed to prove his root of title - Lower court rightly held - That plaintiffs proved their case (H4)

APPEALS - Ground of appeal - Argument that is at variance with the ground - Will be discountenanced and the ground struck out (H5)

LAND LAW - Title - Trespass - Family land - Cannot be validly conveyed as personal property - Appellant that proved no title - Is a trespasser ab initio (H6)

LAND LAW - Appeals - Title - Communal ownership - Appellant's contention against lower court's comment - Goes to no issue - In view of the gravamen of its decision (H7)

LAND LAW - Communal land - Proof of partition - Though appellant failed to discharge - The burden of proof on him - Respondents succeeded in showing that the land in dispute - Is communal property (H8)

APPEALS - Reversal - Issues - Lower court's failure to specifically pronounce - On the issue of estoppel and standing by - Did not occasion a miscarriage of justice - To warrant a reversal (H9)

EVIDENCE - Land law - Estoppel - Previous proceedings - Pleadings - Evidence of previous proceedings relied upon by appellant - Do not relate to the land in dispute - And were not properly pleaded (H10)

FACTS

Before the High Court of Imo State, the plaintiffs/respondents filed a suit against the defendant/appellant and made the following claims - That the plaintiffs are at all materials time to the action in peaceable possession of the land in dispute with an annual value of N10.00 - The defendant broke and entered into the said land in dispute with a caterpillar and damaged the plaintiffs' palm trees, raffia palms and pears on the farm land without leave or licence of the plaintiffs -The defendant has since started to fence the said land and will continue to trespass thereon unless restrained by the court. - A claim of N20,000 general and special damages and perpetual injunction restraining the defendant from further trespass.

The plaintiffs' case was that sometime in 1971, Jonathan Daba who was junior to the 1st plaintiff purported to lease the communal land in dispute to the defendant. But on realizing that the said lease was null and void, returned the purchase price of N624 to the defendant through his solicitor. The defendant on his part sought to establish that the said

Jonathan Daba who leased the land to him is from a different family not related the plaintiffs. The trial court held that title to the land resides in the defendant and the plaintiffs have neither title nor possession. The plaintiffs' appeal to the Court of Appeal was allowed. Being dissatisfied with the decision of the Court of Appeal, the defendant has now appealed to the Supreme Court and the plaintiffs also cross appealed. In this appeal, defendant sought to raise a different case from the one contained in his pleadings which is not permissible in law.

ISSUES FOR DETERMINATION

(i) Whether the learned Justices of the Court of Appeal were right in law and on the facts when they held that the Respondents proved their case.

(ii) Whether the learned Justices of the Court of Appeal were right in law and on facts when they held that the appellant was a trespasser on the said property.

(iii) Whether the learned Justices of the Court of Appeal were right in law in using a document which was not pleaded as evidence of the fact that the Respondents herein had put out a caveat on the property which is the subject matter of the appeal.

(iv) Whether the learned Justices of the Court of Appeal were right in law and on the Facts when they failed to consider the defence of estoppel and the doctrine of standing by as shown on the printed record.

CROSS APPEAL

1. Whether the court below was right when it held that I Exhibit "P" was wrongly received in evidence - GROUND 1 of Cross-Appeal.

2. Whether the Court of Appeal's failure to determine the issue raised in Ground II of the grounds of appeal, occasioned a miscarriage of justice .

HELD (Unanimously allowing the cross appeal but dismissing the appeal per **ONU JSC**)

Facts elicited in cross examination

1. In the face of all these admissions and the judgment in Exhibits C and E as well as the evidence of DW3 and DW4, it is difficult indeed to uphold

the finding of the learned trial Judge of Idigbe, J. as he then was, in the consolidated suits on the communal ownership of the “*EGBELU UMUOGELE*” land, referred to the findings of the Court of Appeal in Exhibit Q, regarding the family of the defendant’s vendor. The inability of the Appellant to counter the Plaintiffs’ overwhelming evidence that Jonathan Daba was from Umuogele family and had no right to sell family property without the consent of the head of the family, made it to have no difficulty in coming to the conclusion that the Plaintiffs proved their case. The Appellant then contended that since the 1st Plaintiff gave evidence that the Supreme Court ordered a retrial of the consolidated cases and that the retrial had been concluded and the Court held that the Appellant’s predecessor in title, JONATHAN DABA, should take the entire land, that ought to have been the end of the case of the Plaintiffs/Respondents.

With utmost due respect, this argument has no merit in that it is elementary that parties are bound by their pleadings and evidence led on unpleaded matters goes to no issue.

The Appellant in his 2nd Further Amended Statement of Defence at pages 101 -106 of the Record did not plead the retrial of the consolidated suits and the subsequent victory of his vendor. What he pleaded was that the suits related to some other parcels of land other than the one in dispute in the case in hand. The Plaintiffs themselves did not plead the retrial of the consolidated suits and the subsequent victory of the Appellant’s vendor. For this reason, I hold the view that the evidence goes to no issue; the law being settled that unpleaded facts elicited in cross - examination go to no issue. (p. 2992 A)

Pleadings - Consistency

2. There is no doubt that the 1st Plaintiff who asserted he was over 100 years when he was giving evidence must have been confused as to which case was tried. However, 5th Plaintiff threw more light on the matter when he testified thus

“We the Plaintiffs (won) we did not sue in 1973, it was the defendants who sued us in 1973, it was the 1973 action that was ordered for retrial by the Supreme Court.”

As demonstrably shown, the retrial which Jonathan Daba and his co-Plaintiffs won was evidenced by EXHIBIT N Judgment in Suit No A/35/73 which was set aside by the Court of Appeal vide Exhibit Q confirmed by the Supreme Court subsequently.

The stance of the Appellant that there was a subsisting judgment stating that the Plaintiffs had no interest in the land, is not borne out by the evidence before the Court.

Before leaving this matter, it remains to point out that while the pleading of the Appellant in relation to the consolidated suits is that they did not relate to the land in dispute, his stance on appeal is that they did and that there was a retrial of the suits and the Appellant's vendor was declared the owner of the land in dispute as against the Plaintiffs. This surely, ought to be deprecated, since a party is not allowed to change his case at will in each Court the proof of a case not being beyond all reasonable doubt but on the preponderance of evidence. (p. 2993 E)

APPEALS - Reversal - Admission of inadmissible evidence

3. The comment complained of was not the crux of the judgment and a fortiori not the end of the matter. For, as this Court pointed out in IDUNDUN v. OKUMAGBA (Supra):

“it is settled law that any wrongful admission of evidence shall not constitute a ground for reversing a decision unless the party complaining can show as well that with such evidence the decision complained of would have been otherwise.”

Thus, in the case on hand, apart from merely asserting that the court below considered an unpleaded document, (in which case such a judgment cannot be allowed to stand) - See *George. v. U.B.A Ltd.* 1972) 1 All NLR (pt.2) 347. The Appellant has not gone further as required by law to show that the judgment of the Court below cannot stand without the alleged unpleaded document. In the absence of such a demonstration, this Court cannot on the state of the authorities interfere with the judgment of the court below.

I agree with the Appellant's submission that if it be conceded for purposes of argument that the Court below wrongly relied on the

unpleaded document by virtue of Section 227 (1) of the Evidence Act, then
 -

“The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and such decision would have been the same if such evidence had not been admitted.” (pp. 2994 B/ 2997 G)

Fact is to be pleaded not document

4. In conclusion, the Plaintiffs/Respondents went further to submit and I entirely agree with them that the argument of the Appellant is specious and untenable for a different reason. The whole argument revolves on the fact that a particular newspaper by which the Umuogele family warned members of the public, was allegedly unpleaded. Now, in Paragraph 8 of the Further Amended Statement of Claim, the Plaintiffs/Respondents pleaded that:

“The members of the general public have been warned that Egbelu Umuogele land and Ohia Ihuala Umuogele land situate at Umuocham village are the family lands of the plaintiffs.”

In the light of the pleading above, I agree with the Appellant’s submission that it was not compulsory for the Plaintiffs/Respondents to plead any document and the inability of the Appellant to establish the title of his vendor which was directly in issue, the Plaintiffs overwhelmingly proved their case as the court below rightly found. It is for the above reasons that I answer without hesitation issue No 1 in the affirmative.

Now, the finding of the Court below is that the Plaintiffs established that “Egbelu Umuogele” land is communally owned. This finding forthcoming as it does from the 1st Plaintiff/Respondent is borne out at Page 37, lines 21 - 29 of the Records. See also Page 51, lines 1-21, Page 54 lines 5-25 and the judgments - Exhibits A and Q. The Plaintiffs thus had thereby established their title to the land in dispute and as a matter of law, were in possession.

Documents need not be specifically pleaded once the material fact, which the document evidences, is pleaded. Whether it was in Eastern State

Express or Eastern Express, the 1962 public warning was pleaded and supported by Exhibit D received in evidence without objection. The court below, in my view, was entitled to appraise the available documentary evidence and draw conclusions therefrom. Exhibit D referred to the 1962 publication and the Appellant did not challenge the assertion at the trial. B (pp. 2994 F/ 2996 B/ 3000 F)

Argument that is at variance with the ground of appeal

5. Equally without foundation is the argument that the Court below erred C in failing to review or appraise the issue of trespass as found by the trial Court. No part of the, ground of appeal deals with this. With due respect, the entire argument proffered by the Appellant on this issue purportedly on the strength of the ground , and its particulars even when given the most D beneficial construction, is of the no purport.

The Plaintiffs/Respondents' contention is that the Appellant is deemed to have abandoned ground 8 of the grounds of appeal since the arguments canvassed ostensibly on the basis of the ground are at variance with the grounds as well as its particulars. See EHOLOR v. OSAYANDE E (1992) 23 NSCC (Pt.2) 434.

In my view, the ground of appeal should be struck out and arguments proffered thereon should be discountenanced. (p. 2995 E)

Family land - Cannot be validly conveyed as personal property F

6. One would then ask: by what authority did the Appellant enter the land in dispute? How did his purported vendor become the owner of the land in dispute to enable him transfer title to the Appellant? It is pertinent to point G out that while the Appellant's case proffered no cogent answer to these questions, the Respondents obviously showed a better title to the land in dispute. Indeed, the Appellant showed no title at all in that he (Appellant) was not in lawful possession. Hence, he was rightly found to be a trespasser. See the case of Aromire v. Awoyemi (1972) 2 S.C 1. The law H is settled that where family property is conveyed as personal property, the purchaser gets no title to the property. See Oyebanji v. Okuwola (1968) NMLR 221. My answer to this issue is accordingly rendered in the

affirmative with the consequence that I uphold the finding that the Appellant was a trespasser ab initio. (p. 2997 A)

Appellant's contention against lower court's comment

B 7. The excerpt from the judgment of the Court below complained about is at page 278. Before the Statement complained of, the court below had considered the respective titles of the parties from pages 266 - 270 of the Record and found from Exhibits 'A' and 'Q' that the land in dispute was communally owned, that the Appellant had the onus of showing how his
C vendor became the exclusive owner of communal property and that the Appellant knew nothing of his vendors' family or the history of the land in dispute. Furthermore, at page 278 lines 24 - 26, of the Record the Court held thus:

D *"The head of the family should have witnessed such a sale but nothing of that sort took place. If the Vendor sold when he could not validly sell, the buyer got nothing. "Nemo dat quod non habet".*

I agree with the Appellant's submission that even if the comment
E made by the court is found to have been wrong, the judgment is still sustainable because the gravamen of the decision was that:

*"Once the Appellants proved and gave unchallenged history of the land that it is communal land which cannot be alienated by any of them without authority, that Jonathan Daba is one of them and not the head of
F the family, that he made spirited efforts to repudiate the date when he realized his error, then it is expecting too much further from the Appellant to prove more. Indeed, they are not allowed to change their case in each court in the hierarchy of courts". (p. 2998 A / 2999 B)*

G

Communal land - Proof of partition

8. The Appellant's other contention is that the Plaintiffs did not show that the land had not been partitioned even if it was a communal one and then
H the Appellant's vendor had no consent to sell. The first point to be made here is that the onus is on the party who asserts that communal property belongs to him, to show how exclusive ownership devolved on him.

This, the Appellant did not do. As a matter of fact, he (Appellant)

displayed arrant and abysmal ignorance of the histories of the land and his vendor's title. See page 262, last paragraph and page 270 of the judgment of the Court below. Irrespective of the failure of the Appellant to discharge the onus of showing how he became entitled to the communal property, the 1st Plaintiff at page 37, lines 21-29 of the Record put the matter beyond peradventure when he testified as follows:-

"In the 1962 action, the head of our family was Chief Wakudu Wahamalu (sic). In his life the land was never partitioned. Up till now the land has not been partitioned. In our family we did not authorize the deceased 2nd Defendant to sell the land to the Defendant. The deceased 2nd Defendant had no authority to sell because the land is a communal land." (Underlining is mine for emphasis).

In conclusion, I hold that on the basis of the unchallenged evidence of inheritance by succession, the acknowledgment of the communal nature of "Egbelu Umuogele" land in Exhibits 'A', Exhibit 'Q' judgment of the Court below regarding the Appellant's vendors' status, once the relevant fact, namely, that members of the public had been warned not to go onto the land having been pleaded, any document in support of the fact pleaded was automatically admissible as evidence of the fact pleaded. (p. 2999 E)

Lower court's failure to pronounce - On the issue of estoppel

9. In also answering this issue in the negative and thus resolving it against the Appellant, it is important to point out that the Plaintiffs/Respondents were the Appellants at the Court below and that it was their own complaint that the court below limited itself to having regard to all the circumstances. A careful perusal of the briefs at the court below reveals that no issue was formulated by any of the parties on estoppel and standing by. That being so, the court is limited by the issues raised by the parties. See Ojo-Osagie v. Adonri (1994) 6 NWLR (Part 349) 131.

It is correct however to say that there were arguments on these H matters in the brief filed by the Appellant in that court.

I agree with the Appellant's submission that even though the court below did not specifically make a pronouncement on the matter, it is

subsumed in the conclusion of the court hereinbefore referred to. See OKONJI V. NJOKANMA (1991) 7 NWLR (Part 202) 131 at page 146. In that regard, I agree with Appellant’s submission that failure to specifically deal with the arguments which were not part of the live issues for determination by the court below, has not occasioned a miscarriage of justice. The law is settled that even where the court below failed to consider an issue or issues for determination, the decision arrived at by that court cannot be set aside unless there is a miscarriage of justice.
(p. 3000 H)

C

Land law - Estoppel - Previous proceedings

10. Finally, EXHIBIT M which was said to be between the Appellant’s Vendor and the Appellant was said to be still pending. It is pertinent to point out that none of the proceedings tendered by the Appellant related to the land in dispute while none of the decisions, if any, made any definite pronouncement on title to “Egbelu land” subject of these proceedings. The interest of the Plaintiffs/Respondents (Umuogele family) was never in issue and there was no decision on it.

E

To worsen matters, none of the Respondents was challenged in the witness box over that fact of their attendance at Court when the suits were being fought, indeed, it was only after the Respondents had closed their case that the Appellant surreptitiously introduced paragraphs 9 (g) and 9 (c) into the 2nd Further Amended Statement of Defence without leave of court. The Appellant purported to make amendments as consequential amendments whereas such consequential amendments must of necessity relate to the amendment made by the other party and is not a license to amend generally. See

F

G

1. Squires v. Squires (1972) 1 All E.R. 891.
2. Supreme Court Practice (1988) Page 347 para. 20/3/4/7.

This accounts for why the paragraphs relied upon by the Appellant for his contention on the question of Estoppel and Standing by were not even before the court. (p. 3002 H)

H

NOTABLE POINTS OF INTEREST**TOBIJSC***1. Title - What to prove so as to succeed*

In the often cited case of *Idundun v. Okumagba* (1976) 9-10 SC 227, this Court enumerated five ways in which title to or ownership of land could be proved. They are: (1) By traditional evidence. (2) By production of documents of title duly authenticated and executed. (3) By acts of ownership extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership. (4) By acts of long possession and enjoyment. (5) Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.

In order to succeed in an action of title to land, a plaintiff need not prove all the five ways. A plaintiff can succeed if he proves even one of the ways. It depends on the evidence he relies upon to prove his case of title or ownership. Let me expatiate on this a bit. If plaintiff relies on traditional evidence as legal basis of his ownership, his duty is only to prove such traditional title. He need not prove any of the four other ways. If the plaintiff is relying on conveyance as legal basis of his ownership, his duty is only to prove the second way, by the production of documents of title or title deeds. And so it goes through the three other ways. (p. 3006 A)

ONNOGHENJSC*2. When a person is deemed to be a trespasser*

On the issue of trespass, it is the law that where a person without title is in occupation or possession of land without the authority or consent of the owner, he is a trespasser. Such a person is also a trespasser where he is let into possession by a person without title or superior title to the owner. In the instant case, there is evidence that respondents are the owners of the land in possession from time immemorial and that appellant broke and entered the land in dispute without the authority or consent of the respondents. Appellant's alleged predecessors in title have been proved to have no title to the land in issue and it is trite law that *nemo dat quod non*

habet In view of the facts and the law, if appellant is not a trespasser on the land in dispute I wonder how else he could be described in law.
(p. 3026 D)

B REPRESENTATION

A. O. Okeaya-Inneh Esq. for the Appellants /Cross Respondents.
A. O. Obianwu Esq. - Senior Advocate of Nigeria, with A. P. Okoye (Mrs.) and Stellamaris Ibegbulam (Miss), for the Plaintiffs/Respondents/Cross-Appellants.

C

CASES REFERRED TO

Orizu v. Anyaegbunam (1978) 5 S.C 21

Kayode v. Odutola (2001) 11 NWLR (Part 725) 659 at 674

D Udechukwu v. Okwuka (1956) 1 FSC 170

George. v. U.B.A Ltd. 1972) 1 All NLR (pt.2) 347

Eholor v Osayande (1992) 23 NSCC (Pt.2) 434

Amakor v. Obiefuna (1974) ALL NLR 109 at 116

E Umeobi v. Otukoya (1978) 4 S.C 33

Oyebanji v. Okuwola (1968) NMLR 221

Idundun v. Okumagba (1976) 9-10 SC 227 at 245

Boulos v. Odunsi (1959) SCNLR 691

F Coker v. Animashawun (1960) L.L.R 71

Adelaja v. Fanoiki (1990) 2 NWLR (Part 131) 137

Asuquo Ekpa v. Etim Utong (1991) 7 SCNJ 170 (1991) 6 NWLR (Part 197) 258 at 282.

Ojo-Osagie v. Adonri (1994) 6 NWLR (Part 349) 131

G Okonji v. Njokanma (1991) 7 NWLR (Part 202) 131 at page 146

STATUTE REFERRED TO

Evidence Act ss. 132(1), 135(1), 137(1), 139 and 227(1)

H

LEAD JUDGMENT BY ONU JSC

This is an appeal against the judgment of the Court of Appeal (hereinafter in the rest of this judgment referred to as the court below)

sitting in Port Harcourt, Rivers State, delivered on 29th of February 2000 allowing the appeal of the Respondents (Plaintiffs in the trial High Court) by setting aside that court's decision. The judgment of the court below is at pages 261-275 of the Records which concluded (Per Pats -Acholonu, JCA as he then was) at page 274 thereof thus: *"In the final result, the appeal succeeds and the judgment of the lower Court is set aside."* B

The appellants herein being dissatisfied filled a Notice of Appeal dated 23rd of March 2000 containing eight Grounds of Appeal. By a Motion on Notice dated 5th November, 2001 the Appellants sought the leave of this court to regularize the said appeal, prayers contained therein which this Court granted in the following terms: C

(i) An order extending the time within which the appellants may seek leave to appeal.

(ii) An order for leave to appeal. D

(iii) Extension of time within which to appeal.

(iv) Leave to appeal on grounds other than grounds of law.

(v) An order deeming the annexed Notice of Appeal was hinged.

The facts of this case as made out in the High Court of Imo State sitting at Aba Division may be briefly stated as follows: E

The Respondents as Plaintiffs/Cross-Appellants in the High Court of Imo State, Aba Judicial Division claimed against the Appellants herein Defendants that: F

"(1) The plaintiffs are at all material times to this action in actual and peaceable possession of the piece or parcel of land known as and called "Egbelu Umuogele" land (hereinafter called "the land in dispute" situate at Umuocham Village Area within jurisdiction of the High Court, Aba and of an annual value of N10.00 (Ten Naira)." G

(2) On the 8th day of August, 1982 the Defendant by himself, his servants or agents willingly and unlawfully broke and entered into the said land in dispute with a caterpillar and damaged the plaintiffs palm trees, raffia palms and pears and farm land, without the leave, consent or H licenses of the plaintiffs.

(3) The Defendant has since started to fence the said land and to put up a batcher thereon and posted something there on and will continue

to so trespass thereon unless restrained by the court.

AND consequential claims of N20,000 general and special damages and perpetual injunction restraining the Defendant by himself, his servants, agents or privies from further entry or trespass unto the said land."

For the said claim See pages 2-3 of the Records. The plaintiff relied on the Further Amended Statement of Claim vide page 88-92 of the Records. The Defendant for his part relied on the 2nd Further Amended Statement of Defence vide pages 101-106 of the Records.

In a considered judgment the trial judge (Johnson, J) held inter alia-
"In the instant case I am satisfied that Title resides in the defendants. The plaintiffs have neither Title nor possession"

The Respondents being dissatisfied with the judgment of the High Court appealed to the Court below on 5th of August, 1992 - the court below allowed the said appeal but the Appellant herein being dissatisfied with the said decision has furl her appealed to this Court.

The parties exchanged briefs of argument; while the Appellants formulated four issues for our determination, the Respondent equally submitted four issues for our consideration as follows:

BY THE APPELLANT they are: -

(i) Whether the learned Justices of the Court of Appeal were right in law and on the facts when they held that the Respondents proved their case.

(ii) Whether the learned Justices of the Court of Appeal were right in law and on facts when they held that the appellant was a trespasser on the said property.

(iii) Whether the learned Justices of the Court of Appeal were right in law in using a document which was not pleaded as evidence of the fact that the Respondents herein had put out a caveat on the properly which is the subject matter of the appeal.

(iv) Whether the learned Justices of the Court of Appeal were right in law and on the Facts when they failed to consider the defence of estoppel and the doctrine of standing by as shown on the printed record.

BY THE RESPONDENTS the issues posed for our determination

are:

“1. *Whether the Court below was right when it held that the Plaintiffs/ Appellants’ proved their case..*

GROUND 3 AND 4:

2. *Whether the Court below was right when it held that the Defendant/Appellant was a trespasser on the land in dispute - GROUND 8*

3. *Whether the comment by the court below that as far back as 1962, members of the public were warned to steer clear of “Egbelu Umuogele” land by the plaintiffs/Respondents caused a miscarriage of justice.*

4. *Whether the Court below erred in failing to consider the defences of estoppel and standing by GROUND 5.”*

Since no issues were formulated by the Appellant from grounds 1, 6 and 7, they are deemed abandoned and should be struck out.

CROSS APPEAL:

1. *Whether the court below was right when it held that I Exhibit ‘P’ was wrongly received in evidence - GROUND 1 of Cross-Appeal.*

2. *Whether the Court of Appeal’s failure to determine the issue raised in Ground II of the grounds of appeal, occasioned a miscarriage of justice -*

GROUND 2 - Cross-Appeal.”

The Plaintiffs tendered the Renaissance Newspaper of June 25, 1975 received in evidence as *Exhibit ‘D’* and *‘the Statesman’* of 18th September, 1981 received in evidence as *Exhibit ‘F’*. The witness testified that he could not trace the “Daily Star” of 16th September, 1977, and the “Eastern Express” of 1961 and 1962 respectively.

The Plaintiffs’ case was that sometime in 1971, Jonathan Daba who was junior to the 1st Plaintiff purported to lease the land in dispute to the Defendant. But on realizing that the said lease was null and void, returned the purchase price of N624 to the Defendants through his Solicitor. The letter returning the purchase price was received in evidence as EXHIBIT H ‘P’.

In spite of this fact, the Defendant on or about the 8th of April, 1987 broke and entered into the Plaintiffs land with the aid of thugs and three

police-men. They entered the land with a caterpillar, bulldozed it and in the process destroyed pear, palm and raffia palm trees. The Plaintiffs' Solicitor, it was maintained, wrote a letter dated 11th March, 1998 to the Defendant warning him of the consequences of his action. The letter was
 B received as EXHIBIT 'D'. In conclusion, it was stated that inspite of the letter the defendant continued his acts of trespass and even put up a small back house during the pendency of the case.

The case made out by the Defendant was to the effect that he leased
 C the land in dispute from Jonathan Daba, a member of Umudaba which family was unrelated to the Plaintiffs' Umuogele family. The deed of lease was Exhibit 'H'. However by Exhibit 'O' put in evidence by the Plaintiffs, the Court of Appeal found that Jonathan Daba, the Defendants' Vendor was a member of Umougele Family and that the "*Umudaba Family*" was
 D fictitious. The judgment was subsequently upheld by the Supreme Court in KAMALU v.. UMUNNA & ORS. (1997) 5 NWLR (Pt.505A) 321 which the Supreme Court confirmed that the entire "*Egbelu Umougele*" land of which the portion in dispute in this case be part of, was communally
 E owned. In addition to the foregoing,, Jonathan Daba who leased the land to the Appellant clearly acknowledged in EXHIBIT 'F' that he was from Umuogele Family and was junior to the 1st Plaintiff.

The Defendant/Appellant alleged that the same Jonathan Daba also
 F sold several portions of the same '*Egbelu Umougele*' land to other persons who had developed their lands. Regrettably, not one of these persons testified on behalf of the Defendant/Appellant and no documents of title were produced.

The Defendant/Appellant produced EXHIBIT 'J', 'K', 'L', 'M' and
 G 'N' which were proceedings in respect of 'Egbelu Umudaba' land and claimed that the Plaintiff were aware of these suits and did not indicate their interest in the land in dispute. "The Defendants case was that the 1962 consolidated cases A/16/62 and A/57/62 did not relate to the land in dispute
 H and he was unable to say anything about his vendor's origin or history.

In conclusion, the Defendant/Appellant however admitted entering the land in dispute and erecting a building thereon.

In my consideration of the appeal I wish to adopt the Defendant/

Appellant's four issues as sufficient to dispose of the appeal as follows:

Issue No. 1 is: Whether the Court below was right when it held that the Plaintiffs/Appellant's proved their case - GROUND 3 and 4.

In order to determine the validity of the arguments proffered by the Appellant, it is pertinent to bear in mind the cases presented before the trial court. B

In paragraph 4(1) of the Further Amended Statement of Claim it was pleaded as follows: -

"4(1) The Plaintiffs are descendants of Ogele their ancestor who first settled on the land in dispute. Ogele had two Children - Amala and Daba who also formed undisturbed on the land in dispute. Other ancestors of the Plaintiffs, namely Aghughara, Oriaku Amala, Onwunji Daba Etheonwu Amala, Woko Echeonwu, Akpom Oriaku, Wakamalu Ekwereonye, Anyatonkwu Echeonwu, Chief Wankudu Wakamalu and J. P. Kamalu at various times expressed acts of ownership on behalf of Umuogele on the land in dispute. C D

In accordance with the pleading, the 1st Plaintiff gave evidence of the deforestation of the land by their ancestor Ogele as well as tracing their line of successions from Ogele to himself, the family head. E

The traditional history was not challenged in the sense that there was no contending evidence of tradition by the Appellant. Indeed, no question was put to the 1st Plaintiff on the history he gave evidence on. In addition to the unchallenged evidence of tradition, the Plaintiffs tendered the judgments in two consolidated suits A/16/62 and A/57/62 as Exhibit A. F The survey plan used in the consolidated suits was tendered and received as Exhibit 'B'. These suits clearly showed that "*Egbelu Umuogele*" was communally owned. The 1st Plaintiff at page 36 lines 21 - 25 testified that the consolidated suits were in respect of the land in dispute. In addition PW3 a licensed Surveyor testified as follows:- G

"Looking at Exhibits B and C (the disputed plan in the present suit). I can see that the two plans depict the same thing. Also the features on both are the same." H

The Appellant called no surveyor and led in evidence in support of his pleading in paragraph 9 (g) of the 2nd Further Amended Statement of

Defence to the effect that:

“Suit No.A/16/62 and A/57/62 consolidated therein referred where in relation to some parcels of land other than the land in dispute”

As indeed transpired, Appellant regrettably failed to identify the
B parcels of land which he claimed were subject of the consolidated suits.
As a matter of fact under cross-examination at Page 79, lines 3 1-32 the
Record depicts thus:

“Question: What was the name of the land in the 1962 action?

Answer: I do not know.”

C The case presented by the Appellant was that he purchased the land
in dispute from Jonathan, Daba who was the head of Umudaba Family of
Umuocham and not a member of Umuogele Family of the Plaintiffs vide
paragraphs 2 and 7(a) of the 2nd Further Amended Statement of the relevant
D facts of Plaintiffs’/Respondents’ Cross - Appellants case as made out in
the Further Amended Statement of Claim at pages 88-92 of the Records
were simply that the land in dispute called “*EGBELU UMUOGELE*”
shown on plan No ASNL/IM/59 LD received in evidence as EXHIBIT C
E was the communal property of Umuogele Family in Umougele Umuocham
in Osisioma Local Government Area of the then Imo State (now Abia
State).

The land in dispute was inherited by the Plaintiffs from their
F ancestors. Ogele deforested the land and lived on it with his two sons Daba
and Amala. Subsequently, other ancestors of The Plaintiffs namely,
Aghughara, Oriaku Amala, Onwunji Daba, Echeonwu Amala, Woko
Echeonwu, Akpom Oriaku, Ehuruonye Amala, Eneigwe Oriaku, Wakamalu
J. P. Kamalu and then Onwuala Kamanu the first Plaintiff in that order
G exercised acts of ownership on behalf of the Umuogele Family at various
times.

The title of the Plaintiffs’ family, it was then demonstrated, had
been established in two consolidated suits A/16/1962 and A/57/1962 in
H which Chief Nwankudu Kamalu on behalf of the Plaintiffs’ family sued
Jonathan Daba (who sold the land to the Defendant/Appellant) and other
junior members of the family. The judgment of the court was received in
evidence as Exhibit A. The court restrained the Defendants from selling

portions of the land in dispute without the consent of the head of the family. Exhibit B was the survey Plan No CS/54/63 showing the “*EGBELU UMUOGELE*” land in dispute in the consolidated suits.

Chief Nwankudu Wakamalu and after him the first Plaintiff as heads of Umuogele family did not consent to the grant of the land in dispute to the defendant by any member of their family. The plaintiffs had by several publications warned members of the public that the “*Egbelu Umuogele*” and *Ohia Ihuala Umuogele*” lands were the family lands of Umuogele people. One Anozie Ozurumba a staff of the State Library services who testified for that the parties do not belong to the same family known as Umuogele family of Umuocham.”

The claim by the Appellant therefore that his vendor Jonathan Daba was from Umudaba and not Umuogele of the Plaintiffs was, patently in my firm view, false as found by the Court below. With this finding, the bottom was knocked off the Appellants’ case since the foundation or indeed the root of title pleaded to wit: purchase from Jonathan Daba of Umudaba, was false.

Significantly, as pointed out in Exhibit F, the said Jonathan Daba acknowledged that the 1st Plaintiff was the head of the said family who testified to the following effect:

“In the 1962 action, the head of our family was Chief Nwankudu Kamalu. In his lifetime, the land was never partitioned. Up till now the land has not been partitioned. In our family we did not authorize the deceased 2nd defendant (Plaintiff) to sell the land to the defendant. He has no authority to sell because the land is a communal one.”

The Court below after referring to the findings in this regard, relied on the judgment of the Aba High Court in Suit No A/35/73 received in evidence as Exhibit N. The Plaintiffs however tendered Exhibit Q, the judgment of the Court below which set aside the decision of the trial High Court.

Exhibit Q (upheld by the Supreme Court in *Kamalu v. Umunna and Ors* (1997) 5 NWLR (Pt.505) p. 321) Ogundare JSC held as follows:

“It would appear also that the learned trial Judge did not consider the various letters tendered in evidence containing admissions by Jonathan

Daba (alias Kamalu) of his membership of Umuogele family and the evidence referred to the Appellants as his relations from the same family with him and that Nwankudu Kamalu was the head of that family.....”

B In the face of all these admissions and the judgment in Exhibits C and E as well as the evidence of DW3 and DW4, it is difficult indeed to uphold the finding of the learned trial Judge of Idigbe, J. as he then was, in the consolidated suits on the communal ownership of the “EGBELU UMUOGELE” land, referred to the findings of the Court of Appeal in Exhibit Q, regarding the family of the defendant’s vendor. The inability of the Appellant to counter the Plaintiffs” overwhelming evidence that Jonathan Daba was from Umuogele family and had no right to sell family property without the consent of the head of the family, made it to have no difficulty in coming to the conclusion that the Plaintiffs proved their case. The Appellant then contended that since the 1st Plaintiff gave evidence that the Supreme Court ordered a retrial of the consolidated cases and that the retrial had been concluded and the Court held that the Appellant’s predecessor in title, JONATHAN DABA, should take the entire land, that ought to have been the end of the case of the Plaintiffs/Respondents.

F With utmost due respect, this argument has no merit in that it is elementary that parties are bound by their pleadings and evidence led on unpleaded matters goes to no issue. See Adebisi v. Oke (1967) NMLR and Orizu v. Anyaegbunam (1978)5 S.C 21.

G The Appellant in his 2nd Further Amended Statement of Defence at pages 101 -106 of the Record did not plead the retrial of the consolidated suits and the subsequent victory of his vendor. What he pleaded was that the suits related to some other parcels of land other than the one in dispute in the case in hand. The Plaintiffs themselves did not plead the retrial of the consolidated suits and the subsequent victory of the Appellant’s vendor. For this reason, I hold the view that the evidence goes to no issue; the law being settled that unpleaded facts elicited in cross - examination go to no issue. See -

1. Kayode v. Odutola (2001) 11 NWLR (Part 725) 659 at 674 Para C - F.

2. Woluchem v. Gudi (1981) 5 S.C 291 at 320.

3. Ewarami v. A.C.B Ltd. (1978) 4 S.C 09 at 108.

4. Udechukwu v. Okwuka (1956) 1 FSC 170.

B

No doubt, the retrial was pleaded in the Amended Statement of Defence, subsequently in both the Further Amended Statement of Defence and the 2nd Further Amended Statement of Defence where the issue was abandoned and a new line of defence, to wit: that the consolidated suits related to other lands, was introduced. An abandoned issue cannot in law, be raised on appeal as the Appellant now seeks to do. See Shell B.P. Ltd. v. Abedi (1974) All NLR 1 at 16 and Comptoir Commercial and S.P.R Ltd. v. Ogun State Water Corporation (2002) FWLR 839 at 852 - 853.

C

No judgment or proceeding evidencing the alleged retrial and subsequent victory of the Appellant's vendor was produced by the Appellant or the Plaintiffs. By the provisions of Section 132(1) of the Evidence Act, Cap. 112, Laws of the Federation, 1990 the only admissible evidence of the alleged retrial and victory of the Appellants' Vendor is the proceedings of the Court. None was produced and none regrettably exists.

D

E

There is no doubt that the 1st Plaintiff who asserted he was over 100 years when he was giving evidence must have been confused as to which case was tried. However, 5th Plaintiff threw more light on the matter when he testified thus

F

"We the Plaintiffs (won) we did not sue in 1973, it was the defendants who sued us in 1973, it was the 1973 action that was ordered for retrial by the Supreme Court."

As demonstrably shown, the retrial which Jonathan Daba and his co-Plaintiffs won was evidenced by EXHIBIT N Judgment in Suit No A/35/73 which was set aside by the Court of Appeal vide Exhibit Q confirmed by the Supreme Court subsequently.

G

The stance of the Appellant that there was a subsisting judgment stating that the Plaintiffs had no interest in the land, is not borne out by the evidence before the Court.

H

Before leaving this matter, it remains to point out that while

the pleading of the Appellant in relation to the consolidated suits is that they did not relate to the land in dispute, his stance on appeal is that they did and that there was a retrial of the suits and the Appellant's vendor was declared the owner of the land in dispute as
B against the Plaintiffs. This surely, ought to be deprecated, since a party is not allowed to change his case at will in each Court the proof of a case not being beyond all reasonable doubt but on the preponderance of evidence.

C The comment complained of was not the crux of the judgment and a fortiori not the end of the matter. For, as this Court pointed out in IDUNDUN v. OKUMAGBA (Supra):

D *"it is settled law that any wrongful admission of evidence shall not constitute a ground for reversing a decision unless the party complaining can show as well that with such evidence the decision complained of would have been otherwise."*

Thus, in the case on hand, apart from merely asserting that the court below considered an unpleaded document, (in which case
E such a judgment cannot be allowed to stand) - See George v. U.B.A Ltd. (1972) 1 All NLR (pt.2) 347.

F The Appellant has not gone further as required by law to show that the judgment of the Court below cannot stand without the alleged unpleaded document. In the absence of such a demonstration, this Court cannot on the state of the authorities interfere with the judgment of the court below.

G In conclusion, the Plaintiffs/Respondents went further to submit and I entirely agree with them that the argument of the Appellant is specious and untenable for a different reason. The whole argument revolves on the fact that a particular newspaper by which the Umuogele family warned members of the public, was allegedly unpleaded. Now, in Paragraph 8 of the Further Amended
H Statement of Claim, the Plaintiffs/Respondents pleaded that:

"The members of the general public have been warned that Egbelu Umuogele land and Ohia Ihuala Umuogele land situate at Umuocham village are the family lands of the plaintiffs."

In the light of the pleading above, I agree with the Appellant's submission that it was not compulsory for the Plaintiffs/Respondents to plead any document and the inability of the Appellant to establish the title of his vendor which was directly in issue, the Plaintiffs overwhelmingly proved their case as the court below B rightly found. It is for the above reasons that I answer without hesitation issue No 1 in the affirmative.

ISSUE 2:

This issue asks whether the court below was right when it held that C the Defendant/Appellant was a trespasser on the land in, dispute.

The Appellant's complaint here pivoted on ground 8 of the grounds of appeal is:

"That the Plaintiffs did not lead cogent and probative value D evidence at the trial for their claim to trespass to be held (sic)"

With utmost due respect, I am of the firm view that the argument cannot be accommodated under ground 8 of the grounds of appeal. This is because there is no complaint dealing with the alleged failure of the Plaintiffs/Respondents to lead cogent and probative value evidence at the E trial.

Equally without foundation is the argument that the Court below erred in failing to review or appraise the issue of trespass as F found by the trial Court. No part of the, ground of appeal deals with this. With due respect, the entire argument proffered by the Appellant on this issue purportedly on the strength of the ground , and its particulars even when given the most beneficial construction, is of the no purport.

The Plaintiffs/Respondents' contention is that the Appellant G is deemed to have abandoned ground 8 of the grounds of appeal since the arguments canvassed ostensibly on the basis of the ground are at variance with the grounds as well as its particulars. See EHOLOR v OSAYANDE (1992) 23 NSCC (Pt.2) 434. H

In my view, the ground of appeal should be struck out and arguments proffered thereon should be discountenanced. Be that as it may, without prejudice to the foregoing, the Plaintiffs/Respondent' view

as to the law of trespass enunciated AMAKOR v. OBIEFUNA (1974) All NLR 109 at 116 postulates thus:

“Generally speaking as a claim for trespass to land is rooted in exclusive possession, all a plaintiff need to prove is that he had exclusive possession or he has the right to such possession of the land in dispute but once a defendant claims to be the owner of the land in dispute, title to it is put in issue and in other (sic) (order) to succeed the plaintiff must show a better title than (sic) of the defendant.”

Now, the finding of the Court below is that the Plaintiffs established that “Egbelu Umuogele” land is communally owned. This finding forthcoming as it does from the 1st Plaintiff/Respondent is borne out at Page 37, lines 21 - 29 of the Records. See also Page 51, lines 1-21, Page 54 lines 5-25 and the judgments - Exhibits A and Q. The Plaintiffs thus had thereby established their title to the land in dispute and as a matter of law, were in possession. See. Umeobi v. Otukoya (1978) 4 S.C 33. The pertinent question is, what was the basis of the Appellants entry into the land in dispute, since there is no dispute he indeed entered the land without the consent of the Plaintiffs. The Defendant (Appellants) title was based on Exhibit H, a deed of lease granted to him by Jonathan Daba in his capacity as head of Umudaba family. By EXHIBIT Q the, Court below held and this Court upheld the judgment, that Jonathan Daba was indeed a member of the Plaintiffs/Respondents’ Family. By Exhibit F, he acknowledged that he was junior to the 1st Plaintiff/Respondent. The pivot of the Appellant’s case collapsed with the finding of the Court below in Exhibit Q and it is little wonder that the Appellant found himself in considerable difficulty in answering questions relating to the family of his vendor as well as his title. The Appellant rather argues that he had established “Copious and Credible evidence of possession which the learned trial Judge believed.”

Now, the law is settled that a trespasser does not by his act of trespass secure possession. Sec - JIMOH ADEBAKIN VS. SABITIYU ODUJEBE (1972) 6 S .C. 6, S.C. 208; (1973) N.M.L.R. 65.

2. BANJO v. AIYEKOTIE (1973) 4 S.C 8

3. ODUNUKWE v. ADMINISTRATOR GENERAL (1978) 1. SC

25.

One would then ask: by what authority did the Appellant enter the land in dispute? How did his purported vendor become the owner of the land in dispute to enable him transfer title to the Appellant? It is pertinent to point out that while the Appellant's case proffered no cogent answer to these questions, the Respondents obviously showed a better title to the land in dispute. Indeed, the Appellant showed no title at all in that he (Appellant) was not in lawful possession. Hence, he was rightly found to be a trespasser. See the case of Aromire v. Awoyemi (1972) 2 S.C 1. The law is settled that where family property is conveyed as personal property, the purchaser gets no title to the property. See Oyebanji v. Okuwola (1968) NMLR 221. My answer to this issue is accordingly rendered in the affirmative with the consequence that I uphold the finding that the Appellant was a trespasser ab initio.

ISSUE 3

The Appellant's grouse in this issue is whether the comment by the court below that as far back as 1962, members of the public were warned to steer clear of Egbelu Umuogele land by the Plaintiffs/Respondents, caused a miscarriage of justice.

In arguing the issue, the Appellant submitted that the Court below was wrong in stating that:

"As far back as 1962, a notice was published in the Eastern State Express that prospective intended buyers should steer clear of the property known as Egbelu Umuogele."

Because, what the Plaintiffs/Respondents pleaded was Eastern Express and not Eastern State Express.

I agree with the Appellant's submission that if it be conceded for purposes of argument that the Court below wrongly relied on the unpleaded document by virtue of Section 227 (1) of the Evidence Act, then -

"The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably

be held to have affected the decision and such decision would have been the same if such evidence had not been admitted.” See IDUNDUN VS. OKUMAGBA (1976)9- 10 SC 227 at 245.

The excerpt from the judgment of the Court below complained about is at page 278. Before the Statement complained of, the court below had considered the respective titles of the parties from pages 266 - 270 of the Record and found from Exhibits ‘A’ and ‘Q’ that the land in dispute was communally owned, that the Appellant had the onus of showing how his vendor became the exclusive owner of communal properly and that the Appellant knew nothing of his vendors’ family or the history of the land in dispute. Furthermore, at page 278 lines 24 - 26, of the Record the Court held thus:

“The head of the family should have witnessed such a sale but nothing of that sort took place. If the Vendor sold when he could not validly sell, the buyer got nothing. “Nemo dat quod non habet”

See also Boulos v. Odunsi (1959) SCNLR 691; Coker v. Animashawun (1960) L.L.R 71 and Adelaja v. Fanoiki (1990) 2 NWLR (Part 131) 137 and Asuquo Ekpa v. Etim Utong (1991)7 SCNJ 170 (1991) 6 NWLR (Part 197) 258 at 282.

In O. Solomon & ors v. A. R. Mogaji & ors (1982) 11 S.C 1 Bello, JSC as he then was at page 17 in his consideration of a similar case such as the one in hand, particularly on the consequences of a contentious sale of family land, pertinently observed inter alia as follows:

“It is pertinent to point out that contentious sale of family land may be classified under three heads.

Firstly, the law has been well settled that sale of family land by a member of the family, who is not the head of the family, without the consent of the head of the family is void. See Ekpendu v. Erika (1959) 4 S.C 79; Oyebanji v. Okunula (1968) NMLR 221; Akerele v. Atunrase (1969) 1 All NLR 201 and Lukan v. Oaunsusi (1972) 1 All NLR (Part 2) H 41 at 45. Such cases are not relevant to the case in hand.”

Secondly, it is trite law that sale of family land by the head of the family without the consent of the principal members of the family is voidable at the instance of the non - consenting members of the family. See

Esan v. Faro 12 WACA 135; Ekipendu v. Erika (supra) Aganran v. Olushi (1907) 1 NLR 67 and Mogaji v. Muga (1960) 5 S.C 107.

In all these cases it has been accepted that the head of the family had sold the family land as such which is not the case in these proceedings.” (Underlining above is mine for emphasis.)

It is for this reason that **I agree with the Appellant’s submission that even if the comment made by the court is found to have been wrong, the judgment is still sustainable because the gravamen of the decision was that:**

“Once the Appellants proved and gave unchallenged history of the land that it is communal land which cannot be alienated by any of them without authority, that Jonathan Daba is one of them and not the head of the family, that he made spirited efforts to repudiate the date when he realized his error, then it is expecting too much further from the Appellant to prove more. Indeed, they are not allowed to change their case in each court in the hierarchy of courts”. See Onyia Nwagu Ngwu & 6 Others v. Ugwa Onuigbo and 3 Others (1999) 13 NWLR (Pt.636) 512; Akuneziri v. Okenwa (2000) 5 NWLR (Pt.291), 526 and Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248.

The Appellant’s other contention is that the Plaintiffs did not show that the land had not been partitioned even if it was a communal one and then the Appellant’s vendor had no consent to sell. The first point to be made here is that the onus is on the party who asserts that communal property belongs to him, to show how exclusive ownership devolved on him.

- See 1. AJUWON V. AKANNI (1993) 9 NWLR (PT. 316) Page 103;
2. BAMGB0SE V. OSOKO (1988) 2 NWLR (Pt.78) P.57.

This, the Appellant did not do. As a matter of fact, he (Appellant) displayed arrant and abysmal ignorance of the histories of the land and his vendor’s title. See page 262, last paragraph and page 270 of the judgment of the Court below. Irrespective of the failure of the Appellant to discharge the onus of showing how he became entitled to the communal property, the 1st Plaintiff at page 37, lines 21-29 of the Record put the matter beyond peradventure

when he testified as follows:-

B *“In the 1962 action, the head of our family was Chief Wakudu Wahamalu (sic). In his life the land was never partitioned . Up till now the land has not been partitioned. In our family we did not authorize the deceased 2nd Defendant to sell the land to the Defendant. The deceased 2nd Defendant had no authority to sell because the land is a communal land.”* (Underlining is mine for emphasis).

C In conclusion, I hold that on the basis of the unchallenged evidence of inheritance by succession, the acknowledgement of the communal nature of “*Egbelu Umuogele*” land in Exhibits ‘A’, Exhibit ‘Q’ judgment of the Court below regarding the Appellant’s vendors’ status, once the relevant fact, namely, that members of the public had been warned not to go onto the land having been pleaded, any D document in support of the fact pleaded was automatically admissible as evidence of the fact pleaded.

See 1: Monier Construction Co. Ltd. v. Azubuike (1990) 3 NWLR (Pt. 136) 74.

- E 2. Odunsi v. Bamgbala (1995) 1 NWLR (Pt. 374) 641.
 3. Ipinlaiye II v. Olukotun (1996) 6 NWLR (Pt. 453) 148.
 4. Allied Bank of Nigeria Ltd. v. Akubueze (1997) 6 NWLR (Pt. 509) 374.

F The foregoing therefore renders the Appellant’s argument futile and unsustainable. Documents need not be specifically pleaded once the material fact, which the document evidences, is pleaded. Whether it was in Eastern State Express or Eastern Express, the 1962 public warning was pleaded and supported by Exhibit D received in evidence G without objection. The court below, in my view, was entitled to appraise the available documentary evidence and draw conclusions therefrom. Exhibit D referred to the 1962 publication and the Appellant did not challenge the assertion at the trial.

H My answer to this issue is also rendered in the negative.

Issue 4 asks whether the court below erred in failing to consider the defences of estoppel and standing by.

In also answering this issue in the negative and thus resolving

it against the Appellant, it is important to point out that the Plaintiffs/Respondents were the Appellants at the Court below and that it was their own complaint that the court below limited itself to having regard to all the circumstances. A careful perusal of the briefs at the court below reveals that no issue was formulated by any B of the parties on estoppel and standing by. That being so, the court is limited by the issues raised by the parties. See *Ojo-Osagie v. Adonri* (1994) 6 NWLR (Part 349) 131.

It is correct however to say that there were arguments on these matters in the brief filed by the Appellant in that court. See C pages 13 - 16 of the Appellant's brief filed in that court and how that court (court below) did not specifically make a pronouncement on them. That court however made the following observations at page 262 line 33 to page D 263, lines 1 - 4 that:

"Later the same Jonathan Daba and one Augustine Mbakwe demolished his house and being reported to the police they were charged and subsequently convicted and they were asked to leave the land. Mbakwe sued Jonathan Daba as the 1st Plaintiff was very regular in E court."

The court clearly adverted to the matter and proceeded to conclude as follows:

"I believe that all efforts were made to rescind the contract of sale F but to no avail. The Appellants proved the ownership of the land that the respondent had adverse possession by way of trespass hence the action. Once the purchase is defective, the deed of lease is of no use. It cannot confer a defective title. Where defendants are led into possession by a G family head without the family consent, the defendants are trespassers ab initio."

I agree with the Appellant's submission that even though the court below did not specifically make a pronouncement on the matter, it is subsumed in the conclusion of the court hereinbefore H referred to. See *OKONJI V. NJOKANMA* (1991) 7 NWLR (Part 202) 131 at page 146. In that regard, I agree with Appellant's submission that failure to specifically deal with the arguments which were not

part of the live issues for determination by the court below, has not occasioned a miscarriage of justice. The law is settled that even where the court below failed to consider an issue or issues for determination, the decision arrived at by that court cannot be set B aside unless there is a miscarriage of justice. See 7UP BOTTLING CO. LTD. & ANOR V. ABIOLA & SONS BOTTLING CO. LTD. (2001) Vol.29 WRN P.99.

The learned trial Judge at page 136 of the Record held as follows:
C “It is in evidence that when the defendant was fighting the high court action, the Plaintiffs Nos. 1, 3, 4, 5 were attending court to listen to the proceedings. It is also in evidence that throughout the period, the Plaintiffs did not apply to be joined to protect their interest over the land. The Plaintiffs cannot now be heard to complain having stood by to watch D the defendant fight the battle alone. The Plaintiffs therefore are estopped from denying the defendants title to the land in dispute. See Witcherly v. Andrews (1871) L.R 21 P&M 327; Ojiako v. Ogueze (1962) 1 All NLR 58; Ekpoke v. Usilo (1978) 6- 7 S.C 187; Etiti v. Oguta (1976) 12 S.C 123; E Ogundiani v. Araba (1978) 6 - 7 S.C 55; Abuakwa v. Adanse (1957) 3 All E.R 559; Obodo v. Ogba (1987) 2 NWLR (Pt.54) 1 at 15; Alase v. Olori Ilu (1964) 1 All NLR 390 at 396; 9; Joe Iga v. Ezekiel Amakiri (1976) 11 S.C 1 at 12 and Wilson Etiti v. Peter Ezeobibi (1976) 12 S.C 123 at 131.

F Now, the crucial question is, which High Court action did the trial Court have in mind? The Appellants tendered EXHIBITS J, K, Land M at the trial. Exhibit J was a Magistrates Court proceedings, namely, Commissioner of Police v. Jonathan Daba (the Appellants’ Vendor) and A. O. Mbakwe. This of course has no bearing on the High Court matter referred G to by the trial Court hereof. Exhibit K was a matter between A. O. Mbakwe and Jonathan Daba and in which Appellant was not a party but to which the trial Judge made a reference regarding the refund of payment made. It is patently clear that this could not have been the matter referred to by H the trial Judge. Exhibit L relates to a suit instituted by one Allwell Daba against the Appellant and Jonathan Daba (Appellant’s Vendor). That suit was struck out for want of prosecution.

Finally, EXHIBIT M which was said to be between the Appellant’s

Vendor and the Appellant was said to be still pending. It is pertinent to point out that none of the proceedings tendered by the Appellant related to the land in dispute while none of the decisions, if any, made any definite pronouncement on title to “Egbelu land” subject of these proceedings. The interest of the Plaintiffs/Respondents B (Umuogele family) was never in issue and there was no decision on it. The pleading of the Appellant is that he purchased the land in dispute from Jonathan Daba who had no relationship with the Respondents. To exemplify that there was a misconception of the case of the parties, it was argued how the Appellant who pleaded that his vendor belonged to a different family called Umudaba that had no relationship with the Respondents’ Umuogele family, turned round to plead that his vendor belonged to a different family called Umudaba that had no relationship with Respondent’s Umuogele family. Appellant’s new line of argument, before this Court and premised on the ground that Jonathan Daba was acting on behalf of Umuogele family, and so parties it is contended, are with respect, bound by their pleadings and that a party is not allowed to change his case in each court in the hierarchy of Courts on the authority of *Akuneziri v. Okenwa* E (Supra) at p.551. As the Appellant never pleaded that the Respondents were estopped because Jonathan Daba was a member of the Umuogele family of the Respondents but that he was allowed to hold himself out as head of Umudaba family, the owners of “*Egbelu Okoro Woha Land*”. F Thus, as can be seen, the Appellant is, with respect, attempting to change his stance in his pleading in this Court.

To worsen matters, none of the Respondents was challenged in the witness box over that fact of their attendance at Court when the suits were being fought, indeed, it was only after the Respondents had closed their case that the Appellant surreptitiously introduced paragraphs 9(g) and 9(c) into the 2nd Further Amended Statement of Defence without leave of court. The Appellant purported to make amendments as consequential amendments whereas such consequential amendments must of necessity relate to the amendment made by the other party and is not a license to amend generally. See:-

1. **Squires v. Squires (1972) 1 All E.R 891.**

2. **Supreme Court Practice (1988) Page 347 para. 20/3/4/7.**

This accounts for why the paragraphs relied upon by the Appellant for his contention on the question of Estoppel and Standing by were not even before the court.

It is for these reasons among others that I resolve this issue against the Appellant and so I dismiss this appeal with costs assessed against the Appellant in the sum of N10,000.

For the Cross- Appeal, the two issues submitted as arising for our determination are:

1. Whether the court below was right when it held that Exhibit P was wrongly received in evidence.

2. Whether the Court of Appeal's failure to determine the issue raised by Ground 11 of the grounds of appeal occasioned a miscarriage of justice.

Having dismissed the appeal, and having regard to all I have hereinbefore stated, I have no hesitation in allowing albeit inconsequentially the cross-appeal.

TOBI JSC

The land in dispute is known and called "*Egbelu Umuogele*" by the plaintiffs. It is called "*Egbelu Okoro Woha*" by the defendants. It is situate at Umuocham village. It is the case of the plaintiffs who are respondents in this appeal that at all material times they were in actual and peaceable possession of the land in dispute. They planted palm trees, raffia palms and pears on the farmland.

The plaintiffs say that sometime in 1971, Jonathan Daba, without the approval or consent of the Head of the family or principal members of the family, purported to lease the land in dispute to the defendant. Jonathan Daba, realizing that the lease was null and void, returned the sum of N624,000 to the defendant by Standard Bank of Nigeria Limited, Aba Cheque No. 696109 of 5th June, 1976. On or about the 8th day of April, 1982, the defendant by himself, servants or agents and three policemen,

without the leave, licence or consent of the plaintiffs unlawfully broke and entered the land in dispute with a caterpillar and damaged the plaintiffs palm trees, raffia palm and pears and farmland. The plaintiffs claimed for special and general damages and perpetual injunction.

The case of the defendant is that Jonathan Onyike Agughara Daba B demised the land in dispute to him and one P. C. Omabu. The defendant later acquired P. C. Omabu's interest in the land and thus became the sole leasee thereof. He relied on Exhibit H, the lease executed between the Jonathan Daba and himself, jointly with P. C. Omabu.

The learned trial Judge gave judgment to the defendant. He C dismissed the case of the plaintiffs. The plaintiffs appealed. The Court of Appeal allowed their appeal. Dissatisfied, the defendant as appellant has appealed to this Court. As usual, briefs were exchanged and both counsel presented oral argument in support of their briefs. D

Learned counsel for the appellant submitted that the respondents did not prove title to the land in dispute. To learned counsel, it is not enough for the respondents to show that the land is a communal one. They ought to show further that (a) the land had not been portioned and (b) the E appellant's predecessor in title had no consent to sell the land.

Learned counsel for the respondents submitted that the respon- dents proved their title to the land in dispute. He submitted that the evidence of traditional history was not challenged in the sense that there was no F contending evidence of tradition by the appellant.

It is elementary law that the burden of proof is on the party who alleges the affirmative of the issue. In other words, the burden of proof is on the party to prove the facts he relies upon to succeed in the case. See G Okechukwu v. Ndah (1967) NMLR 368; Abiodun v. Adehin (1962) 1 All NLR 550; George v. UBA (1972) 8-9 SC 264. In most cases, that party is the plaintiff. See Osawaru v. Ezeiruka (1978) 6-7 SC 135. Similarly, in land matters, the burden of proof is on the party who claims title to or ownership of the land. Again, in most cases, he is the plaintiff. See H Ollivant Ltd. v. Korsah (1941) 7 WACA 188; Adenle v. Oyegbade (1967) NMLR 136; Oyeyiola v. Adeoti (1973) NNLR 10; Onobruchere v. Esegine (1986) 1 NWLR (Pt. 19) 799.

In the often cited case of *Idundun v. Okumagba* (1976) 9-10 SC 227, this Court enumerated five ways in which title to or ownership of land could be proved. They are: (1) By traditional evidence. (2) By production of documents of title duly authenticated and executed. (3) By acts of ownership extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership. (4) By acts of long possession and enjoyment. (5) Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.

In order to succeed in an action of title to land, a plaintiff need not prove all the five ways. A plaintiff can succeed if he proves even one of the ways. It depends on the evidence he relies upon to prove his case of title or ownership. Let me expatiate on this a bit. If plaintiff relies on traditional evidence as legal basis of his ownership, his duty is only to prove such traditional title. He need not prove any of the four other ways. If the plaintiff is relying on conveyance as legal basis of his ownership, his duty is only to prove the second way, by the production of documents of title or title deeds. And so it goes through the three other ways.

The claim of title to the land by the respondents, the plaintiffs in the High Court, is possession and traditional history. Let me read part of paragraphs 4 and 4(1) of the Further Amended Statement of claim:

“4” *[The] plaintiffs at all material times to this action are the owners and in actual and peaceable possession of the piece or parcel of land known and called ‘EGBELU UMUOGELE land’*

“4(1)” *The plaintiffs are descendants of Ogele their ancestor who first settled on the land in dispute. Ogele had two children - Amala and Daba who also farmed undisturbed on the land in dispute. Other ancestors of the plaintiffs namely: Aghughara, Oriaku Amala, Onwunji Daba, Iheonwu Amala, Woko Echeonwu, Akpom Oriaku, Ehuruonye Amala, Eneigwe Oriaku, Wakamalu Enwereonye, Anyatonwu Echeonwu, Chief Wankudu Wakamalu and J. P. Kamalu at various times exercised acts of ownership on behalf of Umuogele on the land in dispute.”*

A community reading of paragraph 4 and (c.) of the Further

Amended Statement of Claim shows that the respondents were in “actual and peaceable possession” of the land in dispute until the appellant and three policemen struck on or about the 8th day of April 1982.

Acts of possession could be taken as acts of ownership if the circumstances are such that the person in possession sought to be regarded as owner. Where plaintiff proves sufficient acts of possession, the burden is thrown on the defendant under section 146 of the Evidence Act to prove the contrary. And the evidence of the defendant must totally dislodge the claim of the plaintiff, and relevantly the averment in paragraph 4 of the Further Amended Statement of Claim.

Traditional evidence is evidence of traditional history. Although history is the study of past events, which by description makes events of yesterday history of today in ordinary dictionary meaning; it goes beyond that in law, particularly when it is qualified by the word ‘*traditional*’. The evidence required is not evidence of yesterday or a few years ago but one of many years; what the lawyers call “*immemorial*” evidence, which means going back to ancient times. In other words, for evidence of traditional history to be acceptable, it must go back to ancient times in the sense that the evidence existed for a very long time. The evidence must have endured through generations.

What was the evidence before the learned trial Judge? PW1, Nwalozie Nwaohamuo, said in evidence in-chief at page 51 of the Record:

“The original owner of Egbelu Umuoge land was our forefather Ogele. The said Ogele was the forefather of the plaintiffs. I knew the deceased 2nd plaintiff. He (the deceased) also came from Umuoge family. The 1st Plaintiff is senior to the deceased 2nd plaintiff. The deceased 2nd plaintiff had no legal right to sell Egbelu land to the defendant outside the knowledge and consent of the 1st plaintiff.”

The witness repeated under cross-examination that the 2nd plaintiff (deceased) had no authority to sell the land hence he was successfully sued. He said that the land in dispute in 1962 was the same land in dispute in 1973. In an answer to a question in respect of the relationship between Enwereonye and Daba, witness said that they came from one father.

The 5th plaintiff, Ihejirika Ahuchogu, said in evidence in-chief at

page 54 of the Record:

"I know the land in dispute called Egbelu Umuogele. The land belongs to our ancestor Ogele and the land passed to us by inheritance... I do not know the sale to the defendant by deceased Jonathan Daba of the land in dispute. When we discovered that the 2nd deceased plaintiff sold the land to the defendant, we questioned the deceased who returned the purchase money to the defendant."

Under cross examination, witness confirmed that there is a blood relationship between Umuogele family and Daba family and that the two families are the same. He also confirmed that the land in dispute in 1962 is the same in the 1973 suit and that the plaintiffs won in the 1962 action. On the 1973 suit, witness answered:

"We did not sue in 1973. It was the defendants who sued in 1973. It was the 1973 action that was ordered for a retrial by the Supreme Court... The plaintiffs in the 1973 suit were Jonathan Daba, Friday Kamalu, Israel Kamalu and Anukem Kamalu... The defendants won."

What did the defendant/appellant say? He said in evidence in-chief at pages 74 and 75:

"Presently the land belongs to me. The original owner of the land was Jonathan Daba the deceased 2nd plaintiff who sold it to me. I bought the land with one P. C. Omabu... In 1976 the late Jonathan Daba sold this land (in dispute) to one Augustine Okoli Mbakwe without my consent. ...When I noticed this behaviour, I reported them to the police. Based on my report, the police charged both Jonathan Daba and Augustine Mbakwe to Magistrate's Court Aba in MA/394C/78. The Court after finding them guilty sentenced them to a fine and ordered them to leave the land."

The man at the centre of all the activities and the problems surrounding 'the land in dispute is Jonathan Daba, the 2nd plaintiff, the deceased. So much of the evidence is connected with or related to him as if he is the conduit pipe. Both parties agree that he sold the land in dispute to the appellant.

Dealing with Jonathan Daba in relation to the sale, the learned trial Judge said at pages 134 and 135:

"(i) Since it has been disclosed that the vendor was an offspring of

Daba one of the two sons of Ogele their common ancestor, the plaintiffs have failed to lead evidence to show specifically that the communal property had not been shared. Consequently, that the portions sold by the vendor did not form part of his own share.

(2) Throughout their evidence and the pleadings, the plaintiffs did not disclose to the court who was the head of their family at the time the vendor sold the land to the defendant in order to prove that somebody else other than vendor was the head. Because a sale of family land by head of the family without the consent of principal members is voidable, not void. See Ekpendu v. Erika (1959) 4 FSC 79. The plaintiffs have failed to prove that the sale of the land to the defendant by the vendor was not without authority.”

With the greatest respect to the learned trial Judge, he has reordered the burden of proof by the above dictum. And that is clearly against the provisions of the Evidence Act. Section 135(1) of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. By section 137(1) of the Act, in civil proceedings, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. Section 139 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It is my view that all the three provisions I have summarized above place the burden on the appellant to prove the issues raised by the learned trial Judge. It is not the case of the respondents that the communal land was partitioned or shared, to use the language of the learned trial Judge. There is no such averment in the Further Amended Statement of Claim; a’fortiori in their evidence in court. It is certainly not the desire of the respondents (to use the phrase in section 135(1)) that the court should give them judgment on portion of the communal land. As a matter of law, if there was any evidence of portion of the communal land to the late

Jonathan Daba, the case of the plaintiff should have drowned. If it was the case of the respondents that the communal land was partitioned, the burden of proof should have been placed at their doorsteps. It does not appear though, that was their case. I do not see any such averment in the Amended Statement of Defence or in their oral evidence in court.

And so the learned trial Judge raised an issue suo motu which was not a matter of the litigation. The law is elementary that it is not the function of a court to instigate parties to litigate on issues that do not bother them. In the circumstance, the learned trial Judge lacked jurisdiction to raise the issue of sharing the communal land in the way he did. That was not the worry of the parties and therefore ought not to have been the worry of the learned trial Judge. He moved beyond his brief and he ought not to have moved beyond his brief.

The second issue the learned trial Judge raised is in respect of the headship of the respondents' family. He seems to have put the blame on the respondents for not providing in their pleadings and evidence in court the head of their family. He related his unsolicited query to the celebrated case of Ekpendu v. Erika supra.

The burden was never on the respondents but was clearly on the appellant. This is because the respondents did not develop their case on headship of their family; but the appellant did. Let me quickly read part of paragraph 2 of the Amended Statement of Defence:

"... The second plaintiff, until his death in or about December, 1982, was the head of Umudaba family of Umuocham village in the Osioma Ngwa District of the Obioma Ngwa Local Government Area of Imo State and not a member of Umuoge family."

In view of the fact that the appellant/defendant averred to the headship of the family, the burden of proof clearly rested on them. And this is by a combined interpretation of section 135(1) and 137(1) and 139 of the Evidence Act. It is trite law that he who asserts must prove the correctness of his assertion. I do not see any evidence vindicating the averment in paragraph 2.

Pleadings, not being human beings, have no mouth to speak in court. And so they speak through witnesses. If witnesses do not narrate

them in court, they remain moribund, if not dead at all times and for all times, to the procedural disadvantage of the owner, in this context, the appellant. Why the trial Judge should shift the burden of proof on the respondents who did not blow any whistle and left the appellant who blew the loudest whistle, beats me hollow and hands down. The learned trial Judge gave a burden to the respondents, a burden that they cannot conveniently carry in law. He was clearly in error and I so hold. B

The Court of Appeal touched the issue and particularly the evidence of the respondent. Pats-Acholonu, JCA (as he then was) said at page 270 of the Record: C

“If that is the case, what has the Respondent got to show. He has to prove that the land he bought was exclusively owned by the vendor and he had an untrammelled right to sell. He is an illiterate, a feature which is a burden and attracts pity. He even said it was not true that Daba came from the family of the Appellants, yet he later gave contradictory evidence making it difficult for himself. The better view is that the testimony elicited during the cross examination that he is ignorant from which family Daba came. There was nothing of the history of the land he knows about.” D E

I agree substantially with Pats-Acholonu, JCA (as he then was). The first two sentences of the learned Justice clearly drown the point made by the learned trial Judge on a possible sharing of the communal land. If the land was shared amongst the members of the family, such evidence should have been given to justify that “the land he bought was exclusively owned by the vendor.” I should mention for whatever it is worth that the appellant claimed to be illiterate, when it was convenient for him under cross-examination. I am taken aback, if not totally surprised that a person who is illiterate could read two dates in two different documents. One is 7/2/83 on Exhibit G. The other is 4th November 1970 in Exhibit H. This is not of any importance but they all assist in telling the story of the veracity or authenticity of the evidence of the appellant. Let that point rest. F G

Learned counsel for the appellant submitted that the respondents did not establish by evidence title to the land in dispute and they were not able to show any form of possession of the land. With respect, I do not agree with him. The evidence led by Nwalozie Nwaohamuo and Ihejirika H

Ahuchogu clearly establish the title of the respondents to the land in dispute. Both witnesses gave evidence of traditional history, tracing title from their forefather, Ogele. As I have already quoted part of their evidence above, I need not repeat myself. In view of the fact that they established their title to the land in dispute by traditional evidence, they are entitled to judgment. After all, on the authority of *Idundun v. Okumagba* (supra), proof of one of the five ways is enough for the proof of title to the land.

Learned counsel for the appellant cited evidence of witnesses of both the respondents and the appellant to justify possession by the appellant. Evidence of adverse possession however strong cannot defeat evidence of title to land. Both Nwalozie Nwaohamuo and Ihejirika Ahuchogu who gave evidence of possession by the appellant under cross examination had earlier given evidence in examination in-chief that the land in dispute belonged to the respondents. In the circumstances, the evidence relied upon by counsel was, at best, adverse possession, being adverse to the title of the respondents.

Learned counsel for the appellant submitted that the Court of Appeal was wrong in law in using a document which was not pleaded as evidence of the fact that the respondents had put out a caveat on the property which is the subject of the appeal. He referred specifically to the Renaissance publication of 25/6/75 (Exhibit E) and the Nigerian Statesman of 18/9/81 (Exhibit F). Perhaps, I should quote paragraph 8 of the Further Amended Statement of Claim:

“The members of the general public have been warned that Egbelu Umuogele land situate at Umuocham village are the family lands of the plaintiffs. The following publications in the Daily Newspapers shall be founded upon at the trial

- (a) *Eastern Express* of 6th March 1961.
- (b) *Eastern Express* of 8th March 1962.
- (c) *Renaissance* of 25th June 1975.
- (d) *Daily Star* of 6th September 1977.
- (e) *Nigerian Statesman* of 18th September 1981.”

The Court of Appeal made reference to Eastern States Express, a

document which was not pleaded. It is clear from paragraph 8 of the Further Amended Statement of Claim that the document pleaded was Eastern Express and not Eastern State Express. To me, that is unnecessary hair splitting particularly in the light of section 227(1) of the Evidence Act.

And that takes me to the submission of counsel in respect of the defence of estoppel and the doctrine of standing by. The appellant as defendant/respondent in the Court of Appeal formulated the following three issues for determination in that court:

“A. Whether having regard to the pleadings and evidence of the parties, the lower court was wrong in dismissing the plaintiffs case.

B. Whether the lower court was wrong in law when it expunged Exhibit P from the records.

C. Whether the judgment of the lower court was against the weight of evidence.”

I ask: where is an issue formulated on defence of estoppel and the doctrine of standing by? The appellants in the courts who are now the respondents here did not even formulate any issue on estoppel and standing by. It is good law that parties are bound by the issues they formulate in their briefs of argument. So too the courts. The courts do not have the jurisdiction to go outside the issues formulated by the parties gallivanting for issues that will be favourable to one of the parties.

In sum, I am of the view that the Court of Appeal was right in allowing the appeal. It is for the above reasons and the more detailed reasons given by my learned brother, Onu, JSC, in his judgment that I too dismiss the main appeal of the appellant. In the circumstance, I do not intend to take the cross appeal, as that will be an academic exercise. I award N10,000.00 costs in favour of the respondents.

OGUNTADE JSC

The respondents were the plaintiffs at the Aba High Court of Imo State, where, as the representatives of the Umuogele family they claimed in trespass against the appellant, as the defendant, for damages and perpetual injunction.

The parties filed and exchanged pleadings after which the suit was heard by Johnson J. The plaintiffs called five witnesses including the 1st and 5th plaintiffs. The defendant, who did not call any witness testified in his own defence. In his judgment on 31-7-92, the trial judge dismissed the plaintiffs' suit. Dissatisfied, the plaintiffs brought an appeal before the Court of Appeal, Port-Harcourt Division (hereinafter referred to as 'the court below'). On 29-2-2000, the court below in its judgment allowed the appeal. The judgment of the trial court was set aside and the claims of the plaintiffs were granted. The defendant has brought before this Court an appeal against the judgment of the court below. The plaintiffs have also brought a cross-appeal.

In the appellant's brief filed, the issues for determination in the appeal were identified as the following:

(i) *Whether the learned Justices of the Court of Appeal were right in law and on the facts when they held that the respondents proved their case.*

(ii) *Whether the learned Justices of the Court of Appeal were right in law and on the facts when they held that the appellant was a trespasser on the said property.*

(iii) *Whether the learned Justices of the Court of Appeal were right in law in using a document which was not pleaded as evidence of the fact that the respondents herein had put out a caveat on the property which is the subject matter of the appeal.*

(iv) *Whether the learned Justices of the Court of Appeal were right in law and on the facts when they failed to consider the defences of estoppel and the doctrine of standing by as shown on the printed record."*

The respondents formulated four issues of their own but those issues are similar to the appellants. It is therefore unnecessary to set them out here. From their cross-appeal however, the respondent formulated two issues thus:

"(1) *Whether the court below was right when it held that exhibit 'P' was wrongly received in evidence - Ground 1 cross-appeal.*

(2) *Whether the Court of Appeal's failure to determine the issue raised by Ground II of the grounds of appeal occasioned - miscarriage of*

justice - Ground 2 Cross-appeal.”

Appellants issues 1 and 2 above when considered come to one thing - a complaint that there was insufficient evidence to sustain the conclusion that the plaintiffs satisfactorily established their case by the evidence called. My learned brother Onu J.S.C. has in the lead judgment shown him. B I have nonetheless thought it necessary to discuss some aspects of the appeal. In doing so, I shall refrain from repeating the facts leading to this dispute save to the extent needed to make my contribution intelligible to follow.

In their amended statement of claim, the plaintiff pleaded the C traditional history upon which they relied. It was pleaded that the plaintiffs' ancestor Ogele first settled on the land in dispute. Ogele died survived by his two children - Amala and Daba. It was pleaded that the land over they D years descended in the Umuogele family. They pleaded the judgments in suits No. A/16/62 and A/57/42. It was pleaded that Umuogele family did not allow individual members of the family to alienate its land and that the family as a unit did not grant possession of the land in dispute to the defendant. The plaintiffs pleaded further that in 1971, a member of the E Umuogele family Jonathan Daba, without the consent of the family purported to grant a lease of the land in dispute to the defendant. Later Jonathan Daba refunded to the defendant the money which the defendant had paid to him for the land. In or about 1982, the defendant without F plaintiffs' permission broke into the land and damaged crops to the value of \$48,700.00. The defendant was still on the land. The plaintiff therefore claimed as stated earlier in this judgment.

The defendant filed a further amended statement of defence on 26- G 6-89. There was an important meeting point between the facts pleaded by the plaintiffs and the defendant. The defendant pleaded that the land in dispute was leased to him and one P. C. Omabu in 1971 by the 2nd plaintiff who was the head of Umudaba family of Umuocham village and not a member of plaintiffs Umuogele family. It was pleaded that the said 2nd H plaintiff died in 1982. The defendant later acquired the interest of P. C. Omabu and became the sole owner of the land. The defendant pleaded that the said 2nd plaintiff granted portions of his family land to several persons.

The defendant pleaded the following cases: A/324/78, A/171/76. A76/78, A/6/62 and A/57/62. It was finally pleaded that the 1st, 3rd, 4th and 5th plaintiffs having allowed the 2nd plaintiff to hold dispute were estopped from claiming the same land as owners.

B It was on this state of pleadings that the suit was tried by the trial court. It is needful that I make some observations on these pleadings. Whereas the plaintiffs pleaded their family's traditional history showing how the land in dispute devolved through the family on the plaintiffs, the
C defendant did not plead how his vendor or predecessor in title derived his title to the land. The defendant by conceding that the 2nd plaintiff was his vendor would appear to have agreed that the 2nd plaintiff was a member of plaintiffs' Umuogele family but the defendant stated that the 2nd plaintiff was in fact the head of another Umudaba family.

D In his evidence at the trial, P.W.1 testified thus:

*"The original owner of Egbelu Umuogele land was our for-father Ogele. The said Ogele was the forefather of the plaintiffs. I knew the deceased 2nd plaintiff. He (the deceased) also came from Umuogele
E family. The 1st plaintiff is senior to the deceased 2nd plaintiff. The deceased 2nd plaintiff has no legal right to sell Egbelu land to the defendant outside the knowledge and consent of the 1st plaintiff."*

F The defendant in his evidence at the trial claimed that he bought the land from Jonathan Daba, the 2nd plaintiff. Under cross-examination the defendant testified thus:

"Put: Jonathan Daba is from Umuogele family.

Ans: It does not concern me.

G *Q: Do you know Jonathan Daba came from Umuogele family?*

Ans: I do not know anything about that.

Q.: Can you read?

Ans: No, I can't. Also I can't write.

Q: Can you sign your name?

H *A: Yes, I can sign my name.*

Put: You agree you are illiterate.

Ans: Yes.

Q.: Did you read the agreement Exhibit H between you And

Jonathan Daba?

Ans: The lawyer read it for me.

Put: The lawyer also interpreted the content of Exhibit H to you."

When the evidence of the defendant reproduced above is contrasted and compared with the extract from the evidence of P.W.1 above, B it is readily seen that there is a curious ambivalence in the evidence of the defendant. How could Jonathan Daba, the 2nd plaintiff who joined other members of Umuogele family in suing the defendant be described by the defendant as the head of another family, the Umudaba? Why was it difficult C to explain how Jonathan Daba the 2nd plaintiff became the head of Umudaba Family? What was the source of Jonathan Daba's interest as head of Umodaba family land?

In *Gbadamosi Ajayi & Ors. v. Gabriel Folarin Pabiekun & Ors.* D [1970] 1 All N.L.R. 142, it was held that the burden of proving that family land has been partitioned lay on the defendant who relied on such partition. It is also settled law that until it is shown that family or communal land has been partitioned, individual members of the family or community has no distinct interest in the land which is alienable - See *Miller Bros. (of E Liverpool) Ltd. v. Abudu Ayeni: Re Sonny Ayeni & Ors.* 5 N.L.R. 42.

In *O. Solomon & Ors. v. A. R. Mogaji & Ors.* [1982] 11 S.C. 1 at 17, Bello JSC (as he then was) discussing the consequences of a contentious sale of family land observed:

"It is pertinent to point out that contentious sale of family land may F be classified under three heads. Firstly, the law has been well settled that sale of family land by a member of the family, who is not the head of the family, without the consent of the head of the family is void: See Ekpendu G v. Erika (1959) 4 FSC 79; Oyebanji v. Okunola (1968) NMLR 221; Akerele v. Atimrase (1969) 1 All NLR 201 and Lukan v. Ogunsusi (1972) 1 All NLR (Part 2) 41 202. Such cases are not relevant to the case in hand.

Secondly, it is trite law that sale of family land by the head of the family without the consent of the principal members of the family is H voidable at the instance of the non-consenting members of the family: See Esan v. Faro 12 WACA 135, Ekpendu v. Erika (supra), Aganran v. Olushi (1907) 1 NLR 67 and Mogaji v. Nuga (1960) 5 FSC 107.

In all these cases it has been accepted that the head of the Family had sold the family land as such which is not the Case in these proceedings.”

It seem to me that given the state of the law and the pleadings of the B parties and the evidence called, it ought to have dawned on the trial judge that what was in dispute was possibly a contentious sale of a family land. The pleadings and evidence in my view clearly pointed the direction to which the trial judge should have followed in evaluating the merits of the parties’ standpoints.

In a passage of the judgment of the trial court suggestive of the fact that the trial judge misunderstood the burden of proof, he said:

“*The question yet to be answered is, if the sale of the same land to other people by the vendor did not create a hullabaloo in the family why must that of the defendant? Two questions still remain to be answered. These are:*

(1) *Since it has been disclosed that the vendor was an offspring of Daba one of the two sons of Ogele their common ancestor, the plaintiffs E have failed to lead evidence to show specifically that the communal property had not been shared. Consequently, that the portions sold by the vendor did not form part of his own share.*

(2) *Throughout their evidence and the pleadings, the plaintiffs did F not disclose to the court who was the head of their family at the time the vendor sold the land to the defendant. In order to prove that somebody else other than vendor was the head. Because a sale of family land by head of the family without consent of principal members is voidable, not void. See Ekpendu v. Erika (1959) 4 FSC. 79.*

G *The plaintiffs have failed to prove that the sale of the land to the defendant by the vendor was not without authority. If the sale to the other people of the same land was valid; therefore the sale to the defendant must be valid. There is no evidence that late Jonathan Daba was not then the H family head. Probably, this accounts for the reason why the vendor was not sued along with the defendant as a co-defendant but was merely added as a second plaintiff.”*

The trial judge could only have reasoned in the manner shown in the

passage above because he accepted the plaintiffs' traditional history that the land belonged to the plaintiffs' Umuogele family. The trial judge failed to appreciate that once it is accepted that a land was originally a family land, the onus was on the party who claimed that the land has been partitioned to call the evidence of such partition. B

I am satisfied that the court below was correct in its views at page 273 of the record when it said per Pats Acholonu J.C.A. (as he then was) who wrote the lead judgment that:

“Once the appellants proved and gave unchallenged history of the land; that it is a communal land which cannot be alienated by any of them without authority; that Jonathan Daba is one of them and not the head of the family, that he made a spirited effort to repudiate the sale when he realized his error, then it is expecting too much further from the appellants to prove more. They are not required to prove the case beyond all reasonable doubt but on the preponderance of evidence.” C D

It is my firm view that the opinion of the court below reproduced above is unassailable in the circumstances. This is a clear case where a member of a community, which owned a communal land without the consent, or concurrence of the other members of the community singly sold communal land to the defendant. Such sale is void. E

It is for this and more elaborate reasons given in the lead judgment of my learned brother Onu JSC that I would also dismiss this appeal. I agree with the view of my learned brother that the cross-appeal is unproductive and merely academic. I would strike it out. F

MOHAMMED JSC

I have had the privilege of reading in draft the judgment of my learned brother Onu JSC which he has just delivered. I entirely agree that there is no merit at all in this appeal which ought to be dismissed. G

This appeal is by the defendant at the High Court of Justice of Imo State sitting at Aba against the judgment of the Court of Appeal Port Harcourt delivered on 29-2-2000 against the defendant who was the successful party at the trial High Court in a case of land dispute. The H

plaintiffs who lost at the trial court and succeeded at the Court of Appeal, were also not happy with that judgment and therefore had cross-appealed against it to this court.

Although four issues were formulated in the appellant's brief of argument and these same issues were virtually adopted in the respondent's brief of argument, the main issue for determination in this appeal is whether the court below was right in law and the facts in holding that the respondents had proved their title to the land in dispute. According to the pleadings and evidence called by the parties, at the trial court, both the appellant and the respondents traced their titles to Ogele, their common ancestor who founded the land in dispute. The evidence of the respondents as plaintiffs had clearly established the status of the land in dispute as communal land belonging to the Umuogele Community including one Jonathan Daba who purportedly sold part of this communal land in dispute to the appellant without the consent of the head of the family or community.

Under the Nigerian Land Law, it had long been well established that there are five ways of proving or establishing title to land. These ways are:

1. Through evidence of traditional history
2. Through production of documents of title which are duly authenticated.
3. Through acts of selling, leasing, renting out all or part of the land or farming on it or on portion of it.
4. Through acts of long possession and enjoyment of the land.
5. By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute.

These five ways of proving title to land were approved by this court in its decision in the case of *Idundun v. Okumagba* (1976) 9/10 SC. 227; (1976) 1 NWLR 200. See also *Achakpa v. Nduka* (2001) 14 NWLR (pt.734) 623; *Adeniran v. Alao* (2001) 18 NWLR (pt.845) 361; *Duru v. Onwumelu* (2001) 18 NWLR (pt.746) 672; *Echi v. Nnamani* (2000) 8 NWLR (pt.667) 1 at 18 and *Balogun v. Akanji* (2005) 10 NWLR (pt.933) 394 at 409-410 in which these ways were restated.

In the case at hand, from the pleadings and the evidence, the plaintiffs now respondents, relied only on the first method of proving title namely, through evidence of traditional history, to establish their claim against the appellant. That was enough as far as the law is concerned because the five ways of proving title to land outlined in *Idundun v. B Okumagba* (supra), are quite separate and distinct in their application. In other words, each of the five ways can be relied upon exclusively by a party to support a claim. See *Morenikeji v. Adegbosin* (2003) 8 NWLR (pt.823) 612 at 661-662. This of course means that each of the five ways of proving title will be sufficient proof. This means that a party claiming title to land is not bound to plead and prove more than one root of title to succeed. Therefore if a party relies on more than one root or way of proving title, that would be merely to make assurance doubly sure, or he does that *ex abundanti cautela*. See *Balogun v. Akanji* (1988) 1 NWLR D (pt.70) 301. Thus, the respondents having relied on only one root or way of proving their title which they pleaded and proved by evidence, the court below was right in finding for them.

With regard to the claim of the appellant of title to the land in dispute, E he relied entirely on the evidence of purchase of the said land from Jonathan Daba, who, the evidence on record revealed was a member of Umuogele Community together with the plaintiffs whose title to the land in dispute had been established. The law is indeed well settled that where F a community or family property is sold or conveyed as personal property, without the consent of the head of the family as happened in the instant case, the purchaser acquires no title. See *Oyebanji v. Okuwola* (1968) NMLR 221; *Odukwe v. Ogunbiyi* (1998) 8 NWLR (pt.561) 339; *Uche v. Eke* (1998) 9 NWLR (pt.564) 24 at 34 and *Echi v. Nnamani* (2000) 8 G NWLR (pt.667) 1 at 18.

The law is also trite that a party, such as the appellant in the instant case, who claims exclusive title to community or family land against the entire family or community, must prove that there had been a partition of H the land claimed. See *Adesanya v. Otuewu* (1993) 1 NWLR (pt.270) 414 at 435. In the present case, the appellant having made no attempt at all to prove the partition of Umuogele Community land incorporating the land in

dispute as the result of which partition, his vendor Mr. Jonathan Daba, a member of the Umuogele community was given his own share of the partitioned community land, had clearly failed to prove his claim of title to the land in dispute as found by the lower court.

B In the result, for the foregoing reasons I also dismiss this appeal and abide by the order on costs in the lead judgment.

As for the cross-appeal of the respondent, the appeal having been dismissed, the question of whether the court below was right in holding that the document Exhibit ‘P’ was wrongly received in evidence, has now become academic requiring no resolution.

C

ONNOGHENJSC

D I have had the benefit of reading in draft the lead judgment of my learned brother Onu JSC just delivered. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed, while the cross appeal be allowed.

E This is an appeal against the judgment of the Court of Appeal sitting in Port Harcourt delivered on the 29th day of February 2000 allowing the appeal of the respondents and setting aside the decision of the trial court. The facts of the case have been fully stated in the said lead judgment of my learned brother and I do not intend to repeat them herein except as may be necessary to emphasize the point (s) being made.

F

The issues that fall for determination are as follows: -

“ (i) *Whether the learned justices of the Court of Appeal were right in law and on the facts when they held that the Respondents proved their*

G *case.*

(ii) *whether the learned justices of the Court of Appeal were right in law and on the facts when they held that the appellant was a trespasser on the said property.*

H (iii) *whether the learned justices of Court of Appeal were right in law in using a document which was not pleaded as evidence of the fact that the Respondents herein had put out a caveat on the property which is the subject matter of the appeal.*

(iv) whether the learned justices of the Court of Appeal were right in law and on the facts when they failed to consider the defences of estoppel and the doctrine of standing by as shown on the printed record.”

The claim of the respondents as plaintiffs at the trial court states as follows: -

“(1) The plaintiffs are at all material times to this action in actual and peaceable possession of the piece or parcel of land known as and called “EGBELU UMUOGELE” land (hereinafter called “the land” in dispute) situate at umuocham village in Osisioma Local Government Area within jurisdiction of the High Court, Aba, and of an annual value of N10.00 (Ten Naira).

(2) On the 8th day of April, 1982, the defendant by himself his servants or agents wilfully and unlawfully broke and entered unto the said land in dispute with a caterpillar and damaged the plaintiffs' palm trees, raffia palm and pears and farm land, without the leave, consent, or licence of the plaintiffs.

(3) The defendant has since started to fence the said land and to put up a batcher thereon and will continue so to trespass thereon unless restrained by the court.

WHEREFORE the plaintiffs claim against the defendant as follows: -

(i) N20,000.00 general and special damages for trespass.

(ii) Perpetual injunction restraining the defendant by himself his servants, agents or privies from further entry or entry or trespass unto the said land.”

The case of the respondents is based on traditional history in that they claim the land as belonging to their ancestors starting from Ogele who deforested and lived thereon with his two sons; that the land had since passed unto the respondents whose title thereto was confirmed in the consolidated suit Nos. A/16/1962 and A/57/1962 against Jonathan Daba who allegedly sold the land in dispute to the appellant. Exhibit A is the judgment in that case in which the defendants therein were restrained from selling portions of the land without the consent of the head of the family. It is in evidence that Daba, the vendor of the appellant, is a junior member

of the family of the respondents and that the land in dispute forms part of the communal land of the respondents.

On the other hand, appellant's case is that he leased the land in dispute from Jonathan Daba a member of Umudaba family which family is unrelated to Umuogele family to which the respondents belong and by virtue of which they lay claim to the said land; the lease of the land is exhibit H. In exhibit Q tendered by the respondents it is the finding of the Court of Appeal that Jonathan Daba is a member of the respondents' Umuogele family and that "*Umudaba family*" is fictitious. That judgment was confirmed by the Supreme Court in *Kamalu vs. Umunna & Ors* (1997) 5 NWLR (pt. 505) 321. The Supreme Court also confirmed that the entire Egbelu Umuogele land to which the portion in dispute forms a part, is communally owned. Appellant tendered exhibits J, K, L, M, and N being proceedings in respect of "Egbelu, Umudaba" land and claimed that the respondents were aware of these suits but failed to participate.

Surprisingly the learned trial judge entered judgment against the respondents who then appealed to the Court of Appeal which allowed their appeal and set aside the judgment of the trial court.

From the submission of learned counsel for appellant it is very dear that learned counsel labours under a misconception of the law applicable to the facts of this case particularly where traditional history of acquisition of land is relied upon in a claim of title to land, amongst other misconceptions.

At page 8 of the appellant's brief, learned counsel submitted thus: -

"it is our humble contention that it is not enough for the respondents to show that the land is a communal one, they needed to have gone further to show that:

- (a) the land had not been partitioned and*
- (b) the appellant's predecessor in title had no consent to sell the said land."*

The above submission seems to be based on the decision of the trial judge at page 134 where he held thus:

"Since it has been disclosed that the vendor was an offspring of

Daba one of the two Sons of Ogele their common ancestor, the plaintiffs have failed to lead evidence to show specifically that the communal property had not been shared. Consequently that the portions sold by the vendor did not form part of his own shares.”

With respect I hold the view that the position adopted by learned B counsel for appellant based on the decision of the trial judge supra stands the law applicable to the relevant facts on its head. From the record there is no disputing the fact that the land in dispute forms part of a larger piece or parcel of land already judicially found and declared communal property C of the respondents family. This fact is, by the findings of the trial judge supra, and available evidence on record, not in dispute. That being the case, it is my considered view that once a piece of land is declared or found to be communally owned, it remains so until the contrary is proved. It is the law that the burden of proving the contrary lies on the party alleging D personal ownership of a portion of land so found to be communally owned. The fact that the land is communally owned means only one thing: that it has not been partitioned and so does not admit of personal ownership. That being the case, I hold the view that there was no burden on the respondents E to show that “*the land had not been partitioned.*” It was even not the case of the appellant that his vendor is a member of the family of the respondents, who are the adjudged owners of the land, neither did he aver that there was any partition of the land in issue. F

It is funny for the learned counsel to submit that respondents also had to show that appellant’s predecessor in title had no consent to sell the land. Consent to sell will only be relevant if pleaded and if Jonathan Daba was said by the appellant to belong to the same family with the respon- G dents, which is not the case here. Also there is the fact that appellant contended in his pleadings and evidence that the land in dispute is not the land belonging to the respondents but to “*Umudaba*” family. How then can appellant’s predecessor in title who is alleged to belong to a different family H from that of the respondents have the consent of the respondents to alienate the land in dispute which land is also said not to belong to the respondents?

Appellant’s counsel has over laboured the oral testimony of 1st

plaintiff to the effect that the Supreme Court decided in the consolidated suits that there be a retrial and that the retrial resulted in the court deciding that the defendants in the suits should take the entire land. This piece of evidence is contrary to documentary evidence showing the actual decision of the courts which are exhibits A & Q. It is trite law that the best evidence of the contents of a document is the production of the document itself. In this case, the fact that there was any retrial ordered by the Supreme Court or the result of the retrial was never pleaded. That being the case, it grounds to no issue. That apart, it is the law that oral evidence is inadmissible to add to or subtract from or contradict the contents of a document; in this case the Certified True Copies of the relevant judgments of the courts on the matter. That being the case, what 1st plaintiff said in court which appellant's counsel sought to rely on becomes irrelevant.

On the issue of trespass, it is the law that where a person without title is in occupation or possession of land without the authority or consent of the owner, he is a trespasser. Such a person is also a trespasser where he is let into possession by a person without title or superior title to the owner. In the instant case, there is evidence that respondents are the owners of the land in possession from time immemorial and that appellant broke and entered the land in dispute without the authority or consent of the respondents. Appellant's alleged predecessors in title have been proved to have no title to the land in issue and it is trite law that nemo dat quod non habet In view of the facts and the law, if appellant is not a trespasser on the land in dispute I wonder how else he could be described in law.

In conclusion I too dismiss the appeal as lacking in merit with costs as assessed in the lead judgment of my learned brother Onu, JSC. I also abide by all other consequential orders therein made.

Appeal dismissed.

H